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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-817

JOSEPH GAMBINO, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

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June 7, 1974

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PETITION FOR REHEARING

On May 13, 1974, this Court denied the petition for writ of certiorari that was filed in this proceeding. For the reasons herein set forth, the petitioner respectfully requests a rehearing of that denial, to the end that a writ issue to review the judgment entered by the Second Circuit on September 26, 1973.

The issues presented in the petition for certiorari were twofold: (1) whether an alien is denied his Fifth

Amendment right to a fair trial when the Government without explanation delays for nearly five years indicting and trying the alien for having made false representations to an F.B.I. agent that he was an American citizen, in violation of 18 U.S.C. § 911, and (2) whether an alien, having been convicted of making such false representations, is entitled to a new trial on the basis of newly discovered evidence that supported the alien's defense that he had had language difficulties in understanding the F.B.I. agent when interviewed more than 5 years earlier.

As the petition emphasized (pp. 11-12), the very fact that petitioner appeared to be a confused alien, who allegedly had difficulty communicating in English, made it essential to treat those two issues with extreme care. When an alien's ability to understand the English language becomes the focal point of an alleged crime, the most mundane of applicable constitutional and legal concepts can easily become vehicles for discrimination against the alien.

This petition for rehearing is confined, in the terms of Rule 58(2), "to other substantial grounds available to petitioner although not previously presented." As so confined, however, re-emphasis must be given to the potential of discrimination against aliens that pervades every issue and every ground for certiorari in this case. To be specific about the "other substantial grounds . . . not previously presented":

(1) As to the due process aspects of the Government's long delay in securing an indictment and bringing petitioner to trial, another ground for certiorari exists in the previously unasked question: Is the probability of prejudice so great in delaying an indictment

and trial of an alien, accused of having made a misrepresentation in a language he had difficulty understanding, that identifiable prejudice resulting from the delay need not be shown?

The petition and the Government's opposition dealt only with the showing of identifiable prejudice. But the first question presented in the petition necessarily encompasses the possibility that this may be one of those procedures employed by the Government that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965). Inherent lack of due process, requiring no showing of identifiable prejudice, has been found by this Court in such matters as an unfair tribunal (*In re Murchison*, 349 U.S. 133, 136 (1955)), undue pretrial publicity (*Rideau* v. *Louisiana*, 373 U.S. 723 (1963)), and lack of counsel (*Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)).

Certiorari thus becomes appropriate to determine if an unexplained delay in indicting and trying an alien under these circumstances, where the delay necessarily diminishes the ability to reconstruct the language difficulties as of the time of the offense, is inherently lacking in due process.

(2) As to the second question, dealing with the right to a new trial on grounds of newly discovered evidence, it may also be true that an allegedly inarticulate alien should not be held to so high a standard respecting newly discovered evidence as befits an ordinary defendant. Certainly the various standards heretofore employed for testing a motion for a new trial on such evidentiary grounds (see petition, pp. 16-18), should be examined to determine which, if any, applies to a motion filed by an alien in these circumstances.

An additional word, appropriate to this rehearing request, must be added in response to the Government's assertion (Opp. Br. 5) that the alleged tapes of the 1967 immigration inquiry do not exist and that only the 1970 hearing was taped.[1] That assertion simply reflects the Government's trial testimony which counsel's affidavit, submitted in support of the motion for a new trial, was designed to contradict. What has thus developed in the certiorari papers is an unresolved factual dispute over the existence of certain tapes that might well be decisive of petitioner's right to a new trial.[2] Certiorari should be granted so that the matter may be remanded to the District Court for an evidentiary hearing on this tape issue.

The significance of the 1967 tapes, if they exist, is obvious. All that the record now contains is testimony by witnesses as to petitioner's facility with the English language in 1967. But taped recordings of petitioner's use of English in 1967 is clearly the best evidence of that facility. "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony." *Nixon* v.

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[1] The Government asserts (Opp. Br. 5) that petitioner's counsel who submitted the affidavit may have confused the 1967 inquiry with the 1970 taped hearing. But that affidavit (Ex. A attached to new trial motion) specifically contradicted the testimony of the immigration reporter regarding the manual recording of the 1967 hearing, referring specifically to the transcript page (T. 91) now relied upon by the Government. It may be the Government, rather than petitioner's counsel, who is confused.

[2] Just since the filing of the Government's brief, petitioner's local counsel has discovered the existence of six additional taped immigration hearings held in 1969, the first being dated January 27, 1969.

Sirica, 487 F.2d 700, 718 (App. D.C. 1973). See also *Lopez* v. *United States,* 373 U.S. 427, 437-440 (1963); *Osborn* v. *United States,* 385 U.S. 323, 326-331 (1966).

Finally, contrary to the Government's claim (Opp. Br. 6), the issue of the tape recordings was brought to the attention of the Second Circuit. While the matter was not mentioned in petitioner's brief in that court, all the papers and affidavits concerning the motion for a new trial were part of the certified record lodged in the Second Circuit and were thus before the court. The matter was also referred to during the oral argument in the Second Circuit.

CONCLUSION

For these additional reasons, supplementing and also incorporating those set forth in the petition for certiorari, rehearing should be granted. The order denying certiorari should be vacated and a writ should then issue.

Respectfully submitted,

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June 7, 1974

Certificate of Counsel

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that this petition is restricted to the grounds specified in Rule 58(2).

EUGENE GRESSMAN
Counsel for Petitioner